

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 3, 2009

BOBBY TAYLOR v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Robertson County
No. 6451 John H. Gasaway, III, Judge

No. M2008-00335-CCA-R3-PC - Filed July 14, 2009

The petitioner, Bobby Taylor, appeals from the circuit court's dismissal of his pro se petition for post-conviction relief. Following our review of the parties' briefs and applicable law, we affirm the post-conviction court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and CAMILLE R. McMULLEN, JJ., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Bobby Taylor.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; John Wesley Carney, District Attorney General; and Dent Morriss, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Procedural Background

This case represents an appeal from the circuit court's dismissal of the petitioner's pro se petition for post-conviction relief. In July of 1986, the petitioner pled guilty in case number 6451 to aggravated rape and was sentenced to forty years in the Tennessee Department of Correction. A copy of the judgment in the case indicates that his sentence was to be served concurrently with sentences given in case numbers 6452 and 6450, Counts 1, 5, 6 and 7.

In November 2007, the petitioner filed a pro se petition for post-conviction relief. In his petition, the petitioner alleged that his forty year sentence was illegal because it was in excess of the minimum sentence of fifteen years for a Range I, standard offender convicted of aggravated rape. The petitioner acknowledged the expiration of the applicable statute of limitations but alleged that he was entitled to bring his claim pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004).

At a proceeding held on January 11, 2008, the circuit court addressed the petitioner's claim and reviewed certified copies of the petitioner's plea agreement, his waiver of appeal, and the judgment and summarily dismissed his petition. A written order was subsequently entered stating that *Blakely* was inapplicable as the petitioner entered a guilty plea in exchange for an agreed sentence. The petitioner filed a timely appeal.

Analysis

On appeal, the petitioner acknowledges that under the 1982 Sentencing Act, a conviction of aggravated rape carried a sentence range of twenty to forty years for a Range I, standard offender. *See State v. Carico*, 968 S.W.2d 280, 286 (Tenn. 1998); *see also* Tenn. Code Ann. § 40-35-109(d) (1982). For the first time in this appeal, the petitioner argues that he was eligible for sentencing under the 1989 sentencing guidelines, which set a maximum sentence of twenty-five years for a Range I offender convicted of aggravated rape. The petitioner also requests that this court consider his post-conviction petition as a petition for habeas corpus relief and seeks an evidentiary hearing on remand for a determination "on the merits of why state habeas corpus relief should not be granted."

This court is bound to the post-conviction court's findings of fact unless the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings is *de novo* with a presumption that the findings are correct. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001). Our review of the post-conviction court's legal conclusions and application of law to facts is *de novo* without a presumption of correctness. *Id*

The petitioner's post-conviction petition is clearly barred by the statute of limitations. In 1986, the Post-Conviction Act established a three-year statute of limitations. Tenn. Code Ann. § 40-30-102 (1990) (repealed 1995). In 1996, the Post-Conviction Procedure Act was amended to the current law which states that a petitioner must seek post-conviction relief "within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final." *Id.* § 40-30-102(a) (1996). The petitioner filed the instant petition more than twenty-one years after the judgment in his case became final. The Post-Conviction Procedure Act enumerates few exceptions to the statute of limitations. *See id.* § 40-30-102(b). In order to qualify, the claim in the petition must be based upon a new rule of constitutional law requiring retrospective application, must be based upon new scientific evidence establishing actual innocence, or must assert relief from sentences which were enhanced because of a previous conviction that has subsequently been found to be illegal. *Id.* In his petition, the petitioner asserted that his claim was not time-barred because his ground for relief under the Sixth Amendment did not arise until the decision in *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007) (*Gomez II*).

We reject the petitioner's argument with regard to his untimely filing. Our courts have repeatedly held that *Blakely*, *Cunningham v. California*, 549 U.S. 270 (2007), and *Gomez II* did not establish a new rule of constitutional law which was entitled to retroactive application on collateral review as it was only a clarification of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). See, e.g., *Ortega Wiltz v. State*, No. M2006-02740-CCA-R3-CD, 2008 WL 1850796, at *9 (Tenn. Crim. App., at Nashville, Apr. 25, 2008), *perm. app. denied* (Tenn. Oct. 27, 2008); *Billy Merle Meeks v. Ricky J. Bell, Warden*, No. M2005-00626-CCA-R3-HC, 2007 WL 4116486, at *7 (Tenn. Crim. App., at Nashville, Nov. 13, 2007), *perm. app. denied* (Tenn. Apr. 7, 2008) (also noting that, "even if *Apprendi*, *Blakely*, and *Cunningham* could be applied retroactively, it would render the judgment merely voidable, and not void, and therefore Petitioner's claims are not cognizable in a Tennessee state habeas corpus proceeding."). We conclude that the petitioner did not file the petition for post-conviction review prior to the expiration of the statute of limitations and has failed to state the basis for the application of any exception to toll the statute. Therefore, the petition for post-conviction relief was properly dismissed.

On appeal, the petitioner admits that his petition was brought outside the applicable statute of limitations, however he avers that his claim entitles him to relief based on his eligibility under the 1989 Sentencing Act. We disagree. First, the argument regarding eligibility under the 1989 Sentencing Act is raised for the first time on appeal. Issues not raised by the petitioner in the lower court, cannot be raised for the first time on appeal. See *Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn. Crim App. 2004). Second, the record shows that the petitioner's sentence was the product of a knowing and voluntary guilty plea. "[A] knowing and voluntary guilty plea waives any irregularity as to offender classification or release eligibility." *Hoover v. State*, 215 S.W.3d 776, 780 (Tenn. 2007). Offender classification and release eligibility are non-jurisdictional and legitimate bargaining tools in plea negotiations under both the 1982 and 1989 Sentencing Acts. *Id.* at 779-80. Furthermore, the petitioner's argument fails on its merits. A lesser sentence is available under the 1989 Sentencing Act only when the offenses were committed before the passage of the Act and the conviction and sentencing occurred after 1989. See *State v. Carico*, 968 S.W.2d at 289. In the instant case, the petitioner's offenses were committed before the passage of the 1989 Sentencing Act and the judgment was entered on July 25, 1986, also prior to the passage of the Act. Therefore, the petitioner was properly sentenced pursuant to a knowing and voluntary guilty plea.

We conclude that the petitioner's claims do not entitle him to relief.

Conclusion

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

J.C. McLIN, JUDGE